

American President Lines, Ltd. and Stephen Mintz.
Case 21-CA-18612

13 September 1983

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
ZIMMERMAN AND HUNTER**

On 9 June 1981 Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, the General Counsel, the Charging Party, and Respondent filed exceptions and supporting briefs, and Respondent filed a response.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found that Respondent lawfully logged and discharged Stephen Mintz for failing to follow orders on 2 December, but that Respondent unlawfully logged Mintz for again failing to follow orders on 7 December—a mere 5 days later. The anomaly of this result is underscored by the fact that the circumstances surrounding both incidents are almost identical.

The first incident began at 9 a.m. on 2 December when Chief Steward Belvin asked Mintz to mop and buff the passageways in the passenger section in preparation for a full load of passengers who were embarking at 10 a.m. Mintz told Belvin he did not want the job as he did not want any extra or overtime work. When Belvin said someone had to do the work, Mintz suggested that Belvin call a union meeting to look for a volunteer or to explore the possibility of hiring local labor to do the work.

¹ The Charging Party and Respondent have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing her findings.

In her Decision, the Administrative Law Judge inadvertently found that Chief Steward Belvin testified that he made an agreement on 27 December 1979 with Union Steward Sisto in Jensen's presence. Belvin, however, testified that the relevant agreement was reached on 2 December and that it was made in the presence of waiter Garcia, not Jensen. Further, the record indicates that Charging Party Mintz contacted the U.S. Consul at Hong Kong on 4 December not 4 November. The Administrative Law Judge also inadvertently found that Mintz testified regarding an order by Belvin to issue linen on 7 December. Mintz testified that no such order to issue linen was made on 7 December, although he noted that a similar order had been given on 1 December.

Mintz then stated he wanted additional pay for the extra work, and Belvin agreed to do so pursuant to the collective-bargaining agreement then in effect. Belvin then ordered Mintz to do the work. Mintz agreed but requested written confirmation pursuant to the collective-bargaining agreement. Belvin refused, and Mintz went to his cabin to obtain a copy of the collective-bargaining agreement and to write out confirmation of the order for Belvin's signature. When Mintz returned, Belvin stated that he was going to log Mintz for refusing to follow orders and then referred Mintz to Captain Jennings, who became impatient with Mintz and ordered him to "turn to," i.e., to go do the work. By the time Mintz began working it was 10:15 or 10:20 a.m., after the passengers had begun embarking and thus after the time the work should have been completed. On the next morning, 3 December, Jennings made an entry in the log stating that Mintz had refused a "simple, normal, legitimate" order given by the chief steward and because of his direct disobedience of the order Mintz was "logged for discharge at the first American port."

The Administrative Law Judge, although finding that Mintz' request for written confirmation as provided for in the collective-bargaining agreement was activity protected by Section 7, rejected the General Counsel's contention that such protected activity was the reason for the discipline. Rather, in light of Mintz' delay in commencing the work as ordered despite the known time strictures, the Administrative Law Judge concluded, in agreement with Respondent, that Mintz' insubordination was the real reason for his discharge and that such insubordination was not protected by the Act. We agree with this conclusion.

However, the Administrative Law Judge, completely ignoring this analysis of the 2 December incident, reached a totally different result based on similar conduct by Mintz on 7 December. As shown below, the record does not support the Administrative Law Judge's finding of an 8(a)(1) violation in the 7 December incident.

Chief Steward Belvin testified that on 7 December he issued an order to Mintz that "when he had dumped the garbage, to clean up the garbage room," but that Mintz refused, claiming that such work would require Respondent to pay him overtime. Mintz, on the other hand, denied that such an order was ever given, claiming that the garbage could not have in fact been dumped on 7 December since the ship was in port, a fact which precludes the dumping of garbage. The Administrative Law Judge, implicitly discrediting Mintz' denial, found that Belvin did order Mintz to dump the garbage but concluded that Respondent could not

logically have logged Mintz for failing to comply with such order as the order could not have been carried out since the ship was in port. Rather, the Administrative Law Judge concluded that the real reason for Respondent's logging of Mintz must have been Mintz' asserted claim for overtime, which constituted protected activity, thereby establishing a violation of Section 8(a)(1) of the Act.

In its exceptions Respondent asserts that the Administrative Law Judge misconstrued the record. While agreeing that garbage cannot be disposed of while a ship is in port, Respondent asserts that Belvin's order on 7 December which Mintz refused to follow was to dispose of the garbage after the ship left port, not while the ship was in port. Given Belvin's uncontradicted testimony quoted above regarding the order given and the undisputed fact that the ship did in fact travel between the ports of Subic Bay and Manila from 7 December to 8 December, it is apparent that the Administrative Law Judge misunderstood the nature of the order given. The Administrative Law Judge, without any basis in fact or logic, incorrectly assumed that Belvin intended for his order given on 7 December to be immediately complied with rather than after the ship had left port. Since the order could have in fact been complied with, but was not, the Administrative Law Judge's conclusion that Respondent's asserted reason for the discipline was specious must be rejected, thereby leaving with no support the Administrative Law Judge's inference that Respondent's motivation must have been Mintz' assertion of his contractual right to overtime. Such an inference is especially unwarranted in this case where Mintz had also asserted his contractual rights on 2 December and was not disciplined for such activity. Based on our analysis of the credited testimony, it is apparent that the General Counsel has not met his burden of establishing a *prima facie* case. In sum, it follows from the record that Respondent, as it had done a few days earlier, lawfully disciplined Mintz on 9 December for his insubordination in failing to follow orders. Further, even if Respondent's discipline of Mintz on 9 December was unlawful, it is doubtful that it would effectuate the purposes and policies of the Act to find a violation here in light of the fact that Mintz had been lawfully discharged 5 days prior to this discipline. For these reasons, we shall dismiss the complaint in its entirety.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: This case was heard before me at Los Angeles, California, on September 9 and 10, and November 3, 1980,¹ pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 21 on March 20, 1980, and which is based on a charge filed by Stephen Mintz, an individual, on January 24, 1980. The complaint alleges that American President Lines, Ltd. (herein called Respondent or the Company), has discriminatorily disciplined Mintz in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act). Respondent, in its reply to the complaint, denies the allegations of discriminatory discipline; also, it maintains that the action was taken for good cause and lawfully.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were timely filed on behalf of the General Counsel and Respondent.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits it is a Delaware corporation engaged in marine transportation between ports in the United States and foreign ports. It is further undisputed that during the past year, in the course and conduct of its business, it has derived revenues in excess of \$50,000 from the transportation of freight in interstate or foreign commerce. Accordingly, I find that Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that the Seafarers International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO (hereinafter called Union), is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Charging Party, Mintz, was employed as a "utility steward"² aboard the vessel SS *President Polk*, which

¹ All dates herein refer to 1979 unless otherwise indicated.

² According to the undisputed testimony of Mintz, as a utility steward, he was responsible for the maintenance of 9 rooms, 11 bunks, 2 passageways, 2 storage rooms, and assisting in the stowing and issuing of stores and linens. Mintz was also responsible for the maintenance of the garbage room.

had a scheduled 84-day trip to the Orient, primarily shuttling between Hong Kong, Subic Bay, and Manila, Philippines.

As here pertinent, the captain of the vessel was Norman Jennings,³ who was in charge of the 45 crewmembers, the radio officer, and Ivan Hall, the purser.⁴

Commencing on November 1, Mintz' supervisor was Robert Belvin,⁵ chief steward. Normally, Belvin supervises 10 employees, including the chief cook, second cook, baker, number one waiter,⁶ waiter number two,⁷ pantry person Rachel Armstrong, passenger BR,⁸ officers BR,⁹ and steward utility.

Respondent and the Union, at all times material to this proceeding, have been parties to a collective-bargaining agreement.

B. Events Leading to Discipline

1. The December 3 logging¹⁰

On or about November 30, Nancy Jensen, the passenger BR,¹¹ had learned of a family emergency necessitating her return to the United States. The vessel was docked at Manila, Philippines, when she departed for home on December 1. On December 2, a full load of passengers¹² was scheduled to embark earlier than was customary.¹³ Hall also informed Belvin that Rachel Armstrong, the third pantry person, went ashore for the day to visit a doctor, further exacerbating the problem of insufficient staff in the stewards department.

The embarking of passengers necessitated the assignment of Jensen's duties to other members of the stewards department. Prior to December 2, Belvin and Sisto discussed the promotion of Garcia to passenger BR. The nature of these discussions, the initial decision reached

therefrom, and the proper method of selecting a replacement for Jensen are the subjects of markedly disparate testimony.

Mintz, who considers himself knowledgeable of the terms and conditions of the collective-bargaining agreement and shipping rules,¹⁴ discussed with Garcia on November 30 the vacancy that would be created by Jensen's departure. Garcia,¹⁵ who shared a cabin with Sisto, the delegate, told Mintz he asked to be promoted to passenger BR and requested that Belvin make the promotion. Mintz informed Garcia that he did not want the job. So when a meeting¹⁶ was called he would not bid on the job. No meeting regarding the vacancy was ever held.

The collective-bargaining agreement provides for promotions as follows:

Section 37 Promotions

(a) In case of a vacancy in any rating, there shall be no promotions aboard any ship covered by this Agreement if suitable men are available from the hall, except as mutually agreed to by the parties. At sea, promotions will be made in accordance with shipping Rules No. 10 and No. 24.

(b) The Delegate will be provided with a list or copy of all jobs open at the end of the voyage at least 24 hours before arrival. This list will include the names of men who are to be discharged. The same list shall be made available to the boarding union official.

Shipping rule 10 establishes seniority classifications. Shipping rule 24 states as follows:

(24) *Promotions* When a promotion is necessary at sea in an emergency, the department head and the delegate will, within the framework of the shipping rules, work out a mutually agreeable promotion. They will give consideration to the person's qualifications and seniority rating. On arrival in home port, a person so promoted may return to the job from which he was promoted unless company and Union representatives ashore agree he may continue in the position to which he was promoted.

Mintz stated that it was up to the chief steward and delegate to resolve the issue.¹⁷

³ Jennings is a supervisor as defined in the Act. He has been permanently assigned as master of the SS *Polk*; has been a ship's master for 15 years, and belongs to the Masters, Mates and Pilots Union.

⁴ Hall described the purser's job as being the captain's secretary.

⁵ Belvin has been going to sea since 1939, has belonged to the Union since 1939, and has been a chief steward since 1945. Respondent admits that Belvin is a supervisor as defined in the Act.

⁶ During the time here pertinent, the number one waiter was William Sisto, who also was elected delegate (union steward) for the stewards department.

⁷ Ray Garcia, who shared a cabin with Sisto.

⁸ "BR" stands for bedroom and Nancy Jensen held this position.

⁹ Preston Anderson held this position.

¹⁰ According to Captain Jennings, a logging is the entry into the official U.S. Coast Guard log of certain prescribed matters, such as infractions that are required to be recorded for Coast Guard review. The *Random House Dictionary of the English Language*, Random House, Inc., New York, New York, 1979, defines a logging as "a deduction from the pay of a seaman, made as a find or a forfeit and recorded in the log book of the vessel." Based on these definitions, and the testimony, it is concluded that loggings are disciplinary actions as defined in the Act.

¹¹ The passenger BR was responsible for the maintenance of the passenger rooms and services to the passenger rooms. This steward's normal duty area was generally located on the boat deck and cabin deck.

¹² Twelve persons comprise a "full load" of passengers.

¹³ Belvin testified that the taking on of passengers was unexpected. However, purser Hall admitted that he knew prior to 8:15 a.m. on December 2 that the ship was going to board passengers in Manila, but only around 8:15 a.m. did he learn that they would embark at 10 a.m., earlier than was customary. Based on demeanor and greater candor, cojoined, as discussed below, with the admission that the need for a replacement for Jensen was the subject of interlocutions on November 30 and December 1, leads me to conclude that Hall's testimony is the more accurate on this point.

¹⁴ It is unrefuted that Mintz had previously successfully filed charges against the Company and considered himself something of a "sea lawyer." Additionally, Jennings admitted that when he assumed command of the vessel, on or about November 1, his predecessor, Captain Robeson, mentioned Mintz by name, but he could not recall if he was named as a troublemaker or in another capacity. Jennings was not extremely candid in replying to questions regarding the nature of this discussion about Mintz. Also, Peachey, Respondent's manager of labor relations, according to Jennings, had "possibly" confirmed Roberson's statement that Mintz was suing the Company. After several more questions, Jennings stated he "understood that [Mintz] was a man to be aware of . . . possibly in a labor angle."

¹⁵ Garcia did not testify.

¹⁶ The collective-bargaining agreement does not require the calling of a meeting to permit bidding for vacancies. However, Mintz' testimony that holding such a meeting for bidding was customary is uncontroverted.

¹⁷ Sec. 13 of the agreement provides:

Continued

According to Belvin, at or about 8:30 a.m. on December 27, he and Sisto agreed, in Jensen's presence, that the waiter would do the work along with Sisto and Belvin. Thereafter, he went to the purser's office and was informed that a full load of passengers would board the vessel that morning. He immediately went to Sisto's and Garcia's room and discussed the altered situation for Garcia would now be needed as a waiter. They decided that the only workable solution was to use the officers BR, Anderson, and the stewards utility, Mintz, to perform Jensen's duties.

According to Sisto, Belvin asked Garcia if he wanted to split wages and do the work of the passenger BR. He does not recall when the conversation occurred. Sisto claims he interceded and said that, if they had passengers, since the pantry person had to go to the doctor, it would be impossible for Garcia, Sisto, and Belvin to split the extra duties.¹⁸ Sisto also testified that Garcia refused the work, that he did not want the job because of the passengers and the missing pantry person.¹⁹ Subsequently, Sisto and Belvin had a conversation in Sisto's room, sometime during the working day, where it was determined that Belvin would have to devote more time to the passengers and could not assume some of the duties of either Sisto or the passenger BR. Therefore, Belvin and Sisto agreed that only the officers BR and utility person were available to assume Jensen's duties.

(a) When a member of the Steward Department is sick or injured while in the service of the vessel or fails to join his ship for any reason and the Company is unable to furnish a replacement and his absence reduces the manning scale below the actual requirements, the equivalent wage, including the extra compensation provided in Section 15, will be divided between those crew members actually doing the work of the sick or injured person.

On freighters, wages shall be divided as follows:

(1) When the galley is reduced below the normal complement, the wages of the missing cook shall be divided among those doing his work. When the Night Cook and Baker is on day work and a cook is missing in the galley, there will be no division of wages.

(2) When passengers are on board and the basic manning of departments other than the Steward Department is short because of missing members, the resultant crew reduction will not be considered in determining the required steward manning.

(b) No members' wages shall be deducted while the sick or injured person remains aboard. This rule shall not apply to any incapacity due to the employee's own misconduct.

(c) When any member of the Steward Department fails to stand his watch, due to drunkenness, or is absent without leave, the man shall pay from his wages or overtime the equivalent of two days' pay for each day of failure to stand his watch. The employee or employees actually doing the work of the one so incapacitated or absent is to receive such amount. The Matter and Union delegate shall cooperate in the enforcement of this Section.

¹⁸ Sisto did not explain how the assignment of duties would result in split wages since it appears the assignment would be a promotion for Garcia and there was no indication that Garcia would continue his duties as a waiter. Belvin and the other witnesses failed to amplify on how this promotion would affect Garcia's duties as a waiter. The contract and shipping rules do not clarify this matter.

¹⁹ The pantry person was to be unavailable only one day, and how this short absence allegedly loomed so large in Garcia's decision raises doubts as to Sisto's credibility. Further, if Garcia was promoted as stated above, there was no indication he would also be required to perform his other duties. It is found that, based on uncontroverted evidence, Sisto and Belvin initially decided to fill in for him to permit the promotion. However, Belvin, at Sisto's urging, determined that the embarkation of passengers would place too great a demand on his time to permit his assumption of some of Garcia's duties.

Consonant with this decision to split the work between Mintz and Anderson, Belvin found Mintz performing his assigned duties and asked him, at or about 9 or 9:15 a.m., to report to his office when he finished cleaning the room he was in. According to Mintz, when he reported to Belvin shortly after the request was made, he was asked to mop and buff the passageways in the passenger section.²⁰ Mintz told Belvin that he did not want any extra or overtime work; he did not want the job. Belvin said someone had to do the work. It was then suggested by Mintz that Belvin call a union meeting to see if another member of the stewards department wanted the job and extra work or even to explore the possibility of hiring local labor to do the work. Mintz said he wanted additional pay for the extra work and Belvin indicated he would pay split wages,²¹ pursuant to the collective-bargaining agreement. Belvin then gave a direct order to Mintz to do the work. In reply, Mintz said he would do the work but requested written confirmation. Section 6 of the collective-bargaining agreement provides, as here pertinent:

Section 6. Orders and Rules

(a) The members of the Union will comply with all lawful orders of superior officers and with all company rules not inconsistent with this Agreement.

If a crewman believes that a direct order of superior officers is inconsistent with this Agreement, he shall nevertheless comply with the order, but upon request made to his department head he shall receive written confirmation of such order from the superior officer giving such order. The matter shall be entered in the official log book.

It is alleged by Mintz that Belvin refused to give him written confirmation or any other type of written statement. Mintz offered to prepare the statement and to let Belvin see his copy of the agreement which provided for written confirmation since, Mintz claims, Belvin said he did not have a copy of the agreement. According to Mintz, it was at this point in the conversation that Belvin became loud and abusive, asserting that he was not going to sign anything and the agreement did not require that he sign anything. Claiming that the agreement was as he described, Mintz went to his room to get a copy of the contract and to write out a statement for Belvin's signature.

It is also asserted by Mintz that when he returned to show Belvin the agreement and get a signature on the written confirmation he prepared, Belvin tried to avoid

²⁰ Belvin and Mintz differed in their testimony about the nature of the work Mintz was initially requested to do. Belvin indicated that he directed that certain areas be vacuumed on that day. Mintz claims no mention was made of vacuuming areas until several days later. This disparity in testimony is not dispositive of any issues, but does have some impact on the credibility findings to be made hereinafter.

²¹ Mintz stated that he believed the additional duties warranted overtime payment for, even though performance was to be accomplished within normal work hours, the situs was outside of his assigned duty station. Mintz later admitted, however, that split wages was the proper method of compensation.

him, yelled at him, stating he would not sign any written confirmation or other document. Mintz did not then commence performance of the new duties assigned him by Belvin but remained in the area of the purser's foyer attempting to discuss matters with Belvin. After several brief encounters, where Mintz avers he tried to explain to Belvin that he was not refusing orders but merely wanted written confirmation, Belvin when, according to Mintz, brushed past him "yelling and screaming, stating 'I'm going to log you. You're refusing orders.'" Mintz again stated that all he wanted was written confirmation. Belvin then referred Mintz to the captain. Mintz' version of the events is credited based on clarity of recollection and demeanor; the fact that he did go to his cabin and got a copy of the contract and wrote out the statement for Belvin to sign; he sought to speak to the captain after Belvin's asserted refusal; and the captain's understanding of the dispute, which was that Mintz wanted written confirmation which Jennings admitted he should have received upon his request and an entry should have been made in the logbook reflecting the said reasons. It is noted that no entry was made in the log reflecting Belvin's orders and the request of confirmation, contrary to the rules.

It is claimed by Mintz that when he sought to speak to the captain he found him occupied with other duties, so he waited approximately 10 minutes in the purser's foyer, the situs of most of the conversations recited above. The captain came to the purser's foyer²² and inquired of Mintz the nature of the problem. Mintz informed him of his request for a written confirmation of the orders given him by the chief steward. Mintz also attempted to show the captain the collective-bargaining agreement. The captain admittedly was impatient with the situation and refused to look at the agreement. Jennings then ordered Mintz to "turn to," which he did. Mintz asserts that he commenced work at or about 10:15 to 10:20 a.m.

Jennings also exhibited poor recollection of the events, stating that he was informed that Belvin was having a problem with Mintz, and that he was concerned about the amount of time it was taking to resolve the problem because passengers were boarding and the vessel was preparing to get underway. The captain understood that Mintz wanted a written confirmation which Jennings said would be given later. He then ordered Mintz to turn to, which he did at or about 10:20 or 10:30 a.m.

Belvin claims that after Mintz requested a written confirmation, the chief steward promised to provide it later. Mintz did not commence work after the promise and, in a subsequent conversation, told Belvin in the purser's foyer that he would not do the work. It is averred by Belvin that after informing Mintz that he was ordered to do the work, Mintz then said, "You black son of a bitch, you can't order me to do nothing."²³ In reply, Belvin as-

serts he stated that "if you don't, I am going to have you logged for direct disobedience of orders, so go to work and do it." Belvin then went to his office and wrote a note for the captain requesting Mintz be logged for direct disobedience of orders. It is noted that the request for logging, according to Belvin, did not contain any reference to the asserted use of expletives or the making of racial slurs. Further, according to Belvin's own testimony, he did not wait to determine if his orders were complied with after informing Mintz he would be logged if he failed to comply when he wrote the note to the captain. It is noted that Jennings stated the decision to log Mintz was his alone, and he did not mention the use of expletives or racial slurs.²⁴

The following day, December 3, Belvin, at or about 9:45 a.m., gave Mintz a written notice describing his order of December 3 as a legitimate order and stating that "written confirmation shall be given at a later time upon request." Belvin then told Mintz he had 10 minutes to report to the captain's office to be logged. The entry in the log under the section titled "Offense Committed" states:

At 0900 you did refuse a simple, normal, legitimate order given by Chief Steward to work in passenger area to prepare same for passengers' embarkation at 10:00. By loud and abusive language to Chief Steward in public area heard by said passengers²⁵ you created a disturbance which lowered prestige of American Merchant Marine and of this vessel. It was after 10:30 before you commenced to carry out order given you at 0900.

Under the section of the log entry titled "Action Taken," the log contains the following statement: "For direct disobedience in refusing and delay in carrying out a legitimate order issued by your superior, you are logged for discharge at the first American port."²⁶

In his reply, on the log, Mintz again asserts that he did not refuse to do the work as ordered; that he informed Belvin that he would do work but he wanted written confirmation consonant with the provision of the collective-bargaining agreement.

Since Belvin's arrival as chief steward on November 1, Mintz and Belvin had had a series of disputes involving

credibility is suspect for he asserts Anderson was present at the time and Anderson testified he did not hear such a statement. Also Hall attributed even more expletives to Mintz than Belvin. Furthermore, Belvin testified he decided at or about 9 or 9:30 a.m. on December 2 to fire Mintz when he directly refused the order. No mention was made by Belvin of the use of abusive language in stating the basis for his decision to discipline Mintz at 9 or 9:30. The alleged use of profanity appears to be an afterthought. It is therefore concluded that the alleged profanity was not a motivating factor in the decision to discipline Mintz.

²⁴ Although Belvin's testimony would indicate that he did not lose his temper, raise his voice, or in any manner act unprofessionally, Anderson, who was a disinterested employee, is deemed most credible on this point, and he stated both Mintz and Belvin were yelling at one another.

²⁵ There was no indication in any of the testimony that any witness herein or any other person ascertained that passengers overheard the alleged loud and abusive language.

²⁶ It is noted that the action taken, according to the log, which does not refer to the alleged abusive language, in this section, was based on Mintz' failure to obey a legitimate order.

²² Also present were Joe Collins, the chief engineer, John Thoreau, the first assistant engineer, George Zellis and Mel Caum, the second assistant engineers, some other crew members and, Mintz believes, several "shoreside people." The "shoreside people" were never identified. Only Hall, Jennings, Belvin, and Anderson testified to the events.

²³ Hall claims that he heard Mintz say to Belvin, "I don't have to take orders from you, you black son of a bitch." Then, after hearing Belvin say "Please do your thing," heard Mintz respond "Fuck you." Hall then claims he went into the foyer to stop the use of the filthy language. Hall's

claims for overtime and disapproval of Mintz' requests for time off.²⁷ After discussing these matters with Belvin, Mintz went directly to the captain, and requested that the captain seek Belvin's compliance with the agreement. He did not file grievances or seek the assistance of the delegate, Sisto, at any time. Mintz regarded Sisto as a company "man who would not fairly represent a member of the unit against the company."

The December 9 logging

According to Belvin, the December 9 logging was based on Mintz' refusal to obey an order to dump the garbage and clean up the garbage room, and refused an order to issue linen on December.²⁸ Hall testified he overheard the order and refusal. Belvin claims Mintz based the refusal on a claim the duties would require overtime. Mintz alleges he did not refuse the order but merely informed Belvin that the request to issue linen engendered overtime. Mintz claims no orders regarding the garbage room were given on December 7.²⁹

It is undisputed, as Mintz asserts, that the vessel was in port, Subic Bay, at the time the order to clean the garbage room was given. It is also undisputed, as Mintz claimed, that while a vessel is in port, the garbage is never dumped. The utility steward waits until the vessel is at sea before dumping garbage. Captain Jennings stated that second logging was again occasioned by refusal to obey a formal order. Also mentioned on the official log entry was a failure on December 8 at 1300 hours to "turn to at normal duties after being directly ordered by the chief steward to do so."

The action taken was to bring "this breach of discipline . . . to attention of U.S. Consul at Hong Kong on December 11." November 4, Mintz had contacted the Consul at Hong Kong, arranging for a meeting because he contended he had been logged falsely on December 3. A member of the consular staff contacted Jennings on December 4 and arranged for the December 11 meeting to take a statement. In the seaman's reply section, Mintz alleged the charges were "discriminatory and pretextual," and that wrongful denials of claimed overtime and time off were the genesis of the disciplinary actions.

Analysis and Conclusions

The protection afforded by Section 8(a)(1) to Section 7 activity prohibits the disciplining of employees for engaging in concerted activity protected by the Act. There need not be proof of "antiunion animus." If the employer punishes an employee for engaging in protected concerted activity, it is a *per se* violation because it directly in-

fringes upon the exercise of statutory rights. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962).

Respondent contends that Mintz acted alone and therefore his activities were not protected concerted activities. Section 6 of the orders and rules, as quoted above, affords the crewman the right to request and, upon such request to his department head, to receive written confirmation of a lawful order. A request by an individual invoking the collective-bargaining agreement is protected activity. Mintz' interpretation of the contract was not shown to be either correct or incorrect. However, his prior difficulties in collecting overtime pay, his statement at the commencement of the series of conversations with Belvin that he wanted to be assured of receiving overtime pay, and Jennings' testimony, cojoined with the fact that he understood that the nexus of the problem was Mintz desire to have written confirmation, lead me to conclude that the request for confirmation was based on his understanding of what was the correct interpretation of the agreement.³⁰ He did not have to purport to act as the spokesman for others inasmuch as he was attempting to enforce the collective-bargaining agreement. The Board has construed such complaints to be grievances under the contract affecting the rights of all employees in the unit. Therefore, it is activity protected by Section 7 of the Act. See *Interboro Contractors*, 157 NLRB 1295 (1966), *H. C. Smith Construction Co.*, 174 NLRB 1173 (1969).³¹

Although the request for confirmation is an activity protected by Section 7 of the Act, the next question is: was it pursued in a manner that resulted in the forfeiture of statutory protection. As the Board found in *Prescott Industrial Products Co.*, 205 NLRB 51, 51-52 (1973):

The Board has long held that there is a line beyond which employees may not go with impunity while engaging in protected concerted activities and that if employees exceed the line the activity loses its protection. That line is drawn between cases where employees engaged in concerted activities exceed the bounds of lawful conduct in a moment of animal exuberance or in a manner not motivated by improper motives and those flagrant cases in which the misconduct is so violent or of such character as to render the employee unfit for further service.

The next question, therefore, is whether the protected concerted activity was undertaken in an unlawful

²⁷ Mintz alleges that Belvin failed to honor the agreement regarding time off. The agreement provides:

Section 34 Time Off

Members of the Steward Department will be given time off as is practicable, having in mind the requirements of the Department. The Chief Steward will designate who will have time off. He will see that the job is covered for the man off duty.

²⁸ Belvin testified only about the garbage room. Mintz claimed he did follow all orders and none were given regarding the garbage room.

²⁹ Belvin further testified that the incident occurred on December 8. The log entry, which was the official record, will be credited here inasmuch as it formed the basis for the discipline and was prepared shortly after the alleged incident.

³⁰ As the Board has held in *New York Trap Rock Corp.*, 148 NLRB 374 (1964); *Bunney Bros. Construction Co.*, 139 NLRB 1516 (1962), and *Morrison-Knudsen Co.*, 149 NLRB 1577 (1964), the issue of whether the complaint is meritorious is irrelevant to the question of whether an employee is engaged in protected concerted activity. Cf. *Mushroom Transportation Co.*, 142 NLRB 1150, 1158 (1963), reversed on other grounds 330 F.2d 683 (3d Cir. 1964) and *Socony Mobil Oil Co.*, 153 NLRB 1244 (1965).

³¹ It is contended by Respondent that the *Interboro Contractors*, decision should not be relied on for "[a] conflict exists among the current courts as to whether the doctrine comports with the Act." The applicable Board law, which has not been reversed by the Supreme Court, is the *Interboro*, test, and it will be followed herein. See *Charles H. McCauley Associates*, 248 NLRB 346 (1980).

manner. It is concluded that Mintz' conduct rendered him "unfit for further services."³²

In the recent *Bettcher* case, the Board found that a discharge was discriminatory where it was based upon an employee's statement during a bargaining conference that his employer could juggle his books to show a loss, thus implying that his employer was dishonest. The General Counsel urges that the rule of that case should be applied here to the discharge of Columbo. We cannot agree.

In the *Bettcher* case, the Board pointed out that genuine collective bargaining would not be possible if an employer could discharge the union's representative for remarks which might reasonably be expected in the give and take of a bargaining conference. However, the Board also pointed out that its ruling did not mean that an employee might never be lawfully discharged for what he said or did in a bargaining conference. Instead, the Board held that a line must be drawn between those cases in which an employee acts in a moment of "animal exuberance" or in a manner "not activated by improper motives," and those cases in which the conduct is so violent or so offensive as to render the employee unfit for further service.

In the instant proceeding, Mintz engaged in his protest over a long period of time, by his own estimate, more than an hour. This action was taken despite recognition that he was delaying in carrying out a lawful order where he understood the exigencies and Belvin's desire to proceed with dispatch. Furthermore, this action was taken on a vessel where all "members of the crew are obliged to promise to obey lawful commands . . . to . . . carry out the lawful orders of my superior officers on shipboard."³³

It is concluded that the General Counsel has failed to establish that Mintz' request for confirmation was the reason he was disciplined. Rather the record clearly demonstrates that he delayed in accepting and starting a work assignment which was a justifiable basis for the discipline for it was based on the Company's legitimate business interest of preparing the vessel for passengers. This delay of commencement of work in the face of the known time strictures³⁴ constitutes insubordination and Mintz (2) was in effect attempting to work on his own terms." *Yellow Freight System*, 247 NLRB 177 (1980). Cf. *John S. Swift Co.*, 124 NLRB 394, 397 (1979); *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946). Furthermore, the contract provided for the filing of a

grievance to protest Belvin's actions, which rendered the delay in Mintz work completely unnecessary.

Other aspects of Mintz conduct on December 2 which render it unprotected are: (1) that most of the activity was conducted in the purser's foyer during a time when Mintz knew passengers would be boarding shortly," he observed that "shoreside" personnel were present (3) he referred to Anderson as an Uncle Tom, and (4) the captain believed he publicly used expletives and made racial slurs toward an officer and not in a bargaining context or other milieu where lower standards of etiquette prevail. See *Lutheran Social Service of Minnesota*, 250 NLRB 35, 43, fn. 23 (1980). It is therefore found that the December 2 protest was not undertaken in a "lawful manner" and it is recommended that the portion of the complaint regarding the December 3 logging be dismissed.

The December 9 logging included the allegation that Mintz refused an order to clean up the garbage room when such an order could not have been complied with until the vessel was at sea. Furthermore, there was no showing that Mintz refused to assist in the laundry room after he made his claim for overtime pay pursuant to his interpretation of the contract. The inclusion of this specious basis for the logging leads to the conclusion that this discipline was invoked because Mintz persisted in making claims for overtime and time off consonant with his understanding of the contract. As previously found, these requests are protected concerted activities. Respondent has failed to show that Mintz' request for overtime or time off had lost the protection of the Act because they were undertaken in an unlawful manner. See *Alleluia Cushion Co.*, 221 NLRB 999 (1975), and *Colonial Stores*, 248 NLRB 1187 (1980).³⁵ Therefore, it is concluded that Respondent violated Section 8(a)(1) of the Act when it logged Mintz for such activity.

CONCLUSIONS OF LAW

1. The Respondent, American President Lines, Ltd., is an employer within the meaning of Section 2(2) of the Act, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Seafarers' International Union, Atlantic, Gulf, Lakes and Inland Waters District, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By disciplining Stephen Mintz on December 9, 1979, for engaging in protected concerted activity, Respondent has violated Section 8(a)(1) of the Act.

4. Respondent has not been shown to have engaged in any other violations of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent did not violate Section 8(a)(1) of the Act by its logging of Stephen Mintz on December 3, 1979, which included discharge upon arrival at the first port located in the continental United States.

³⁵ The December 9 logging, as heretofore found, is discipline and the fact that Mintz was to be discharged was previously determined in the December 3 logging, does not exempt the Company from responsibility for subsequent violations.

³² As the Board held in *E.A. Laboratories*, 88 NLRB 673 (1950), citing *Bettcher Mfg. Corp.*, 76 NLRB 546 (1948):

³³ *Southern S. S. Co. v. NLRB*, 316 U.S. 31 at 43, fn. 16 (1942). The Court further stated at p. 45 and 46:

In any event, a sweeping requirement of obedience throughout the course of a voyage is certainly not without basis in reason. The strategy of discipline is not simple. The maintenance of authority hinges upon a delicate complex of human factors, and Congress may very sensibly have concluded that a master whose orders are subject to the crew's veto in port cannot enforce them at sea.

³⁴ The extent of the delay cannot be deemed insignificant. *Empire Steel Mfg. Co.*, 234 NLRB 530 (1978).

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(1) of the Act, it is recommended that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Since Respondent lawfully provided for the dis-

charge of Stephen Mintz upon arrival at "the first American port" prior to unlawfully disciplining him on December 9 and has since made unconditional offers of re-employment, there was no loss of earnings suffered from the unlawful discipline and, there, no need to provide for reimbursement.

[Recommended Order omitted from publication.]